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Supreme Court, U.S.
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No.95-1398

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

TERRY ALSBERG, dba Alsberg Brothers Boatworks

Petitioner,

vs.

JEROME E. ROBERTSON

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

Henry G. Rendler, Esq.
(Counsel of Record)
555 North First Street
Suite 203
San Jose, CA 95112
Telephone: (408) 293-5112

and

of counsel
Joseph H. Moless Jr., Esq.
890 Washington Street
Santa Clara, CA 95050
Telephone: (408) 983-1300

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I. INTRODUCTION

Petitioner summarizes respondent's arguments in his Opposition Brief as follows:

1. Petitioner is seeking more than the allowed value of the California Exemption.

2. Use of a single date of cleavage to determine exemption rights is not applicable here because petitioner's claim of exemption was not filed contemporaneously with the original bankruptcy petition.

3. Petitioner is not entitled to a homestead exemption if tax liens consume the debtor's equitable interest.

4. Under Title 11 of the United States Code, California law intends to and is allowed to determine the value of exempt property on a date other than the date of filing.

5. This is simply a matter of California Law and there is no conflict among the Circuits.

II. DISCUSSION

Respondent's brief attempts to rephrase the question in this case from one of time, to one of amount. Yet, the amount ($33,875) of the debtor's interest on date of filing is known, as is the amount ($115,000) on date of sale. No one disputes these amounts. The dispute has been and remains one of time. The question remains: Are the rights of a debtor and an estate, to property in which an exemption is claimed, fixed as of the date of sale or as of the filing date? Respondent stands with the 9th Circuit: that it is date of sale. Petitioner stands with the Congress, this court, and the 3rd, 4th, 5th, 7th and 10th Circuits: that it is the date of filing that controls. Following is a point by point discussion of respondent's arguments:

1. The value of petitioner's exemption.

The Congress spoke with utmost clarity regarding time and exemptions in 11 USC §522, titled: "Exemptions":

> "In this section--"value" means fair market value as of the date of the filing of the petition..." 11 USC §522(a)(2)

Therefore, by definition, any discussion of exemption rights must begin and end with that value and no other. The leading treatises have discussed the impact of this definition on bankruptcy administration in a consistent fashion:

> "The key date for exemptions is the date of the petition for relief. Rights to exemptions are fixed as of that date." (*Cowans Bankruptcy law and Practice*, Sixth Edition, 1994, Vol. 2, pg. 132.)

> "When exemptions are claimed, therefore, the fact that the value of the property that the debtor seeks to exempt has changed since the filing of the petition will not affect the amount of such property that the debtor may exempt." (*Collier on Bankruptcy*, 15th edition, 1989, Vol. 3, pg. 522-15.)

The conspicuous omission in respondent's brief of any discussion of §522(a)(2) or the $33,875 value as of the filing date, suggests that respondent believes Congress does not mean what it says or has not said what it means.

Petitioner's position has always been, and remains simply this: He asserts that he is entitled to exempt the aggregate of legal and equitable interests in his home, valued at $33,875, effective as of the date of filing. No more, no less.

Petitioner has never asserted that he is entitled to exempt an amount in excess of $100,000, as respondent erroneously claims, or even the $45,000 amount that the bankruptcy court provided. To do so would be in obvious conflict with this court's holding:

> "§522(b) provides that the debtor may exempt certain property "from property of the estate"; obviously, then, an interest that is not possessed by the estate cannot be exempted. Thus if a debtor holds only bare title to his house -- if, for example, the house is subject to a purchase-money mortgage for its full value -- then only that legal interest passes to the estate.....Legal title will pass, and can be the subject of an exemption." *(Owen v. Owen*, 500 U.S. 305, 308-309 (1991))

Petitioner's position is clearly consistent with the holding in *Owen*. By definition, value on date of sale, or for that matter any other date, is irrelevant in the determination of exemption rights in the context of a bankruptcy.

2. Relevance of a B-4 schedule to the cleavage date.

It is difficult to understand the point that respondent is making in discussing petitioner's B-4 schedule. The bankruptcy court found the exemption to be properly claimed. Respondent has never objected to the allowance of the exemption. He cites no statutory or case law for his argument that a delay in filing a B-4 schedule somehow affects the date of cleavage or makes the definition contained in §522(a)(2) irrelevant. Virtually all on point case law reinforces the conclusion that the exact time that an exemption is claimed is

irrelevant to the determination of the date of cleavage. (See e.g. *In re Magallanes* , 96 B.R. 253 (9th Cir BAP 1988).

3. Relevance of tax liens.

The existence of tax liens in no way prevents petitioner from using his exemption in this case. Even if it were held that the tax liens consumed the entirety of the petitioner's equitable interests, by this court's holding in *Owen v. Owen, supra,* 500 U.S. 305, 308-309, petitioner's legal interest in the bare title, by itself, could be exempted.

4. Issues of California homestead exemption

Examination of the 9th Circuit's recent interpretations of the California homestead exemption, as used in bankruptcy, is beyond the scope of this reply. It must suffice to note, that the 9th Circuit has gone so far, in *In re Bernard*, 40 F.3d 1028 (9th Cir. 1994), as to hold that: the homestead exemption cannot exempt the "residence itself" from the estate.

By definition, the homestead is the debtor's residence, This latest iteration of 9th Circuit opinion paradoxically disallows the use of the "homestead exemption" to exempt a homestead. The homestead exemption's historical purpose has been to prevent the court ordered sale of a debtor's home. Yet, the 9th Circuit, alone among the Circuits, has held that the homestead must be sold before it can be exempt. The fact that California elected to limit homesteads exempted from sale, to those with a net value less than $45,000, does not alter the tautologous nature of petitioner's simple contention that homestead exemptions in fact can have the effect of exempting a homestead. The 9th Circuit is in conflict with that tautology.

Regardless, the question of whether or not the California exemption can exempt the homestead itself, by strict construction, is irrelevant. §541(a)(1) and the holding in *Owen v. Owen, supra,* 500 U.S. 305, 308-309, establish that when a homestead is encumbered, only the debtor's net interests come into an estate, not the "residence itself".

In the instant case, interests valued at $33,875 came into the estate. Subsequently, interests valued at $33,875 were exempted from the estate. The estate's interest, along with respondent's right to administer any sale of the home disappeared into nullity, as of the filing date. Any other conclusion is legally and mathematically indefensible.

Respondent's argument that California Code of Civil Procedure §703.140, as clarified by California Senate Bill 651, is not applicable to the current case is simply a misstatement of legislative intent as clearly espoused in that bill. The entire bill is reprinted in the appendix at pg. A4. It specifically states at Section 2:

> "The Legislature finds and declares that the amendment of Section 703.140 of the Code of Civil Procedure by Section 1 of this act pertaining to exemptions in bankruptcy is not a change in, but is declaratory of, existing law." (S.B. 651)

The sole purpose for passing this legislation was to aid the federal courts in interpreting California's legislative intent as it has always existed. As respondent correctly states that intent at page 10 of his brief, "... California law has always provided for a homestead exemption in the bankruptcy context.". The bankruptcy context, of course, includes the

requirements of time contained in §522(a)(2) which applies in all fifty states. California did not and cannot opt out of the requirements of §522(a)(2). Furthermore, S.B. 651 states with utmost clarity that a sale by any procedure is not necessary and irrelevant to the use of the California exemption in bankruptcy. As with the Congress, apparently respondent believes that the California legislature does not mean what it says or has not said what it means.

5. Conflicts in this case go far beyond California law.

Respondent contends that this is a simple matter of California law and that the 9th Circuit's decision, basing exemption rights on conditions in effect on date of sale, does not conflict with decisions of this court or the other circuits. Yet, this court's decision in *White v. Stump*, is in direct and obvious conflict with the 9th Circuit's holding:

> "When the law speaks of property which is exempt and of rights to exemption, it, of course, refers to some point of time. In our opinion, this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The provisions before cited show -- some expressly and others impliedly -- that one common point of time is intended, and that it is the date of the filing of the petition." (emphasis added) (*White v.Stump*, 266 U.S. 310, 313 (1924))

Respondent entirely ignores the numerous cases cited from this court and the 3rd, 4th, 5th, 7th and 10th Circuits, in

the Petition for Writ Certiorari, as evidence of uniform conflict with the 9th Circuit's decision here.

Petitioner cited the *Matter of Sherbahn,* 170 B.R. 137 (N.D.Indiana 1994) as evidence that the implications of the 9th Circuit's decision here, have already begun to erode use of a single date of cleavage and expand the conflict to cases having nothing to do with nuances of California homestead law.

Use of a single date, the date of filing, as the date of cleavage for adjudicating exemption rights has heretofore been hornbook law. Respondent's arguments, in like fashion to the 9th Circuit's decision here, are in conflict with this large body of otherwise well settled law.

III. SUMMARY

Over the centuries, bankruptcy law has been refined to a high degree. Use of a single date of cleavage is neither a recent nor arbitrary choice. Its importance to effective case administration derives from three inarguable facts:

A) Exemptions in bankruptcy are essential to a debtor's fresh start.

B) The value of property tends to change with time, because conditions affecting value change with time.

C) The fresh start, itself, may change the conditions affecting value (as was the case here).

Where value affects exemption rights, the timing of those rights must necessarily synchronize with the fresh start. A debtor needs to know that there is a bright line that separates pre-petition affairs from post-petition affairs. The debtor, the creditors and the trustee need to know whether or not the estate has a post-petition interest in the debtor's home based on

conditions that exist at that bright line. As a practical matter, a debtor needs to know if it is the debtor's family or the estate that will benefit from post-petition efforts at paying a mortgage, remodeling a bathroom, painting the homestead etc.

By ignoring the $33,875 filing date valuation, in essence, respondent is arguing that §522(a)(2) is irrelevant. By reducing the language Congress chose to define the nature of exemptions to irrelevance, respondent argues in effect that exemptions themselves are irrelevant. If his arguments and the decision of the 9th Circuit prevail, the heretofore well laid out landscape of bankruptcy becomes a frontier without clear demarcations between exempt property and estate property. It is not an exaggeration to suggest that if the concept of a single bright line of cleavage disappears the benefits of exemptions, as they serve the fresh start intent of the Congress, disappear into confusion.

IV. CONCLUSION

The respondent's brief has not materially addressed the obvious conflict between the 9th Circuit's decision and the relevant Federal statutory language, the decisions of this court, of the Circuit courts and the California legislature's statutory language cited in the Petition for Writ of Certiorari. Therefore, the petition should be granted.

Respectfully submitted,

Henry G. Rendler, Esq.
555 North First Street
Suite 203
San Jose, CA 95112

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APPENDIX TO REPLY BRIEF

(11 USC §522 reprinted in relevant part)

SUBCHAPTER II

Debtor's Duties and Benefits

SECTION 522 (11 U.S.C. SS 522)

§522. Exemptions.

(a) In this section-

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(11 USC §541 reprinted in relevant part)

SUBCHAPTER III

The Estate

SECTION 541 (11 U.S.C. SS 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(Subsections (b) and (c)(2) are herein inapplicable)

CIVIL PROCEDURE-BANKRUPTCY-HOMESTEAD EXEMPTION

CHAPTER 1111
S.B. No. 651
AN ACT to amend Section 703.140 of the Code of Civil Procedure, relating to bankruptcy,declaring the urgency thereof, to take effect immediately. .

[Approved by Governor October 10, 1993]
[Filed with Secretary of State October 11, 1993]

LEGISLATIVE COUNSEL'S DIGEST

SB 661, Kopp. Bankruptcy: exemptions.

Existing law sets forth the exemptions available in bankruptcy, as specified.

This bill would provide that the homestead exemption is available regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure. The bill would also state that it is declaratory of existing law, and specify the findings and declarations of the Legislature in this regard.

The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 703.140 of the Code of Civil Procedure is amended to read:

703.140. (a) * * * In a case under Title 11 of the United States Code, all of the exemptions provided by this chapter including the homestead exemption, other than the provisions of subdivision(b) * * * are applicable regardless of whether there is a money judgment against the debtor or whether a money judgment is being enforced by execution sale or any other procedure, but the exemptions provided by subdivision (b) may be elected in lieu of all other exemptions provided by this chapter, as follows:

(1) If a husband and wife are joined in the petition, they jointly may elect to utilize the applicable exemption provisions of this chapter other than the provisions of subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(2) If the petition is filed individually, and not jointly, for a husband or a wife, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if both the husband and the wife effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(3) If the petition is filed for an unmarried person, that person may elect to utilize the applicable exemption provisions of this chapter other than subdivision (b), or to utilize the applicable exemptions set forth in subdivision (b), but not both.

(b) The following exemptions may be elected as provided in subdivision (a):

(1) The debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, or a burial plot for the debtor of a dependent of the debtor.

(2) The debtor's interest, not to exceed one thousand two hundred dollars ($1,200) in value, in one motor vehicle.

(3) The debtor's interest, not to exceed two hundred dollars ($200) in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed five hundred dollars ($500) in value, in jewelry held primarily

for the personal, family, or household use of the debtor or a dependent.

(5) The debtor's aggregate interest not to exceed in value four hundred dollars ($400) plus any unused. amount, of the exemption provided under paragraph (1), in any property.

(6) The debtor's aggregate interest, not to exceed seven hundred fifty dollars ($750) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value four thousand dollars ($4,000) in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent of the debtor.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive any of the following:

(A) A social security benefit, unemployment compensation, or a local public assistance benefit.

(B) A veterans' benefit.

(C) A disability, illness, or unemployment benefit.

(D) Alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(E) A payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless all of the following apply:

(i) That plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose.

(ii) The payment is on account of age or length of service.

(iii)) That plan or contract does not qualify under

Section 401(a), 403(a), 408(b), 408, or 409 of the Internal Revenue Code of 1954.

(11) The debtor's right to receive, or property that is traceable to, any of the following:

(A) An award under a crime victim's reparation law.

(B) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(C) A payment under a life insurance contract, that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(D) A payment, not to exceed seven thousand five hundred dollar ($7500) on amount of personal bodily injury, not including pain and suffering of compensation for actual pecuniary loss, of the debtor or an individual for whom the debtor is a dependent.

(E) A payment in compensation of loss of future earnings of the debtor or an Individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

SEC. 2, The Legislature finds and declares that the amendment of Section 703.140 of the Code of Civil Procedure by Section I of this act pertaining to exemptions in bankruptcy is not a change in, but is declaratory of, existing law. The Legislature further finds and declares that the decision in In re Pladson, 164 B.R. 805 (N.D. Cal. 1993), holding that the homestead exemption Is not available in bankruptcy, is not a correct interpretation of California law. The Enforcement of Judgments Law provides exemptions for various forms of property, including homesteads, and contains a number of special procedural protections for special forms of property. It is not, and never has been, the intention of the Legislature to restrict any of the exemptions in bankruptcy because of technical language concerning the procedures for claiming exemptions in state money judgment enforcement proceedings under the Enforcement of Judgments Law. See, e.g.,

Tentative Recommendation Proposing the Enforcement of Judgments Law, 15 CaL 1, Revision Comm'n Reports 2001, 2095-96 (1980); 1982 Creditors' Remedies Legislation, 16 Cal. L. Revision Comm'n Reports 1001, 1098-99 (1982).

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure proper implementation of the homestead exemption without delay, it is necessary that this act go into immediate effect.

*(Additions or changes indicated by underline; deletions by asterisk * * *)*